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# Total Success Investments, LLC v. Ada County Highway Dist. Appellant's Brief Dckt. 36069

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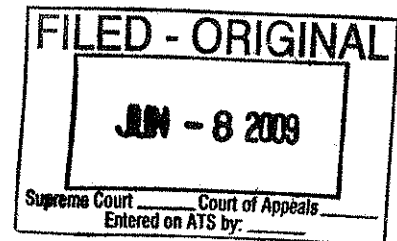
IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 36069.

TOTAL SUCCESS INVESTMENTS, LLC, an Idaho Limited Liability Company,  
Appellant

vs.

ADA COUNTY HIGHWAY DISTRICT and WASHINGTON MUTUAL BANK,  
Respondents



APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County.  
Honorable Judge Sticklen presiding

ROATS LAW OFFICE, PLLC, Richard T. Roats, Residing in Boise, Idaho, for Appellant

TROUT JONES GLEDHILL FUHRMAN, P.A. Respondent Ada County Highway Dist.

HAWLEY TROXELL ENNIS & HAWLEY, LLP Respondent Washington Mutual Bank

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## STATEMENT OF THE CASE

### Nature of the case

This case involves the district court's denial of Appellant Total Success Investments, LLC's (Total Success) request for a Writ of Mandate.

### Course of proceedings below and disposition

On April 15, 2008, Total Success submitted its Verified Application for Alternative Writ of Mandate and supporting exhibits. R. 3-29. Respondent Ada County Highway District ("ACHD") responded on June 13, 2008. R. 42-46. In its Memorandum Decision and Order, the district court (Judge Sticklen) denied Total Success' Application for Alternative Writ of Mandate. R. 47-54. On January 26, 2009, the district court (Judge Carey) officially issued an order dismissing the Application. R. 57-58. Judge Carey awarded ACHD \$54.00 in costs. R. 53-54. Washington Mutual received an award of \$4,019.50 in costs, including attorney fees. R. 66-73.

### Concise statement of the facts

Total Success owns land abutting an alley that is twelve feet wide and travels from State Street to Dewey Street in Boise. The alley was formally dedicated as part of the Cruzen Addition in 1906. R. 12. Encroaching upon this alley are utility poles owned by Idaho Power, and landscaping, including shrubs and dilapidated railroad ties owned by Washington Mutual (WaMu)<sup>1</sup>. R. 6 ¶¶ 9, 10. At approximately three feet at the widest point, the encroachments eliminate almost 25% of the twelve-foot alley. REPORTER'S TRANSCRIPT ON APPEAL, p. 24, ll. 11-17. Both Idaho Power and WaMu have

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<sup>1</sup> WaMu successor in interest is Chase Bank.

agreed to remove the encroachments at the request of ACHD, but ACHD retracted its request and now refuses to make such a request. R. 48, 7 ¶¶ 13, 14. Consequently, Total Success sought a Writ of Mandate requesting that ACHD require the removal of Idaho Power's power poles and WaMu's landscaping. R. 3C. The district court dismissed the Application for the Writ; from that dismissal, Total Success appeals.

### **ISSUES PRESENTED ON APPEAL**

1. Whether the district court improperly applied the law when it denied Appellant's Application for Writ of Mandate.
2. Whether the district court erred in concluding that an award of attorney fees was appropriate.

### **STANDARD OF REVIEW**

"On appeal from a decision denying a writ of mandamus this Court's task is to apply the same standard required of the district court." Brady v. City of Homedale, 130 Idaho 569, 571 (1997). The authority to issue a writ of mandamus derives from Idaho Code § 7-302, which provides:

It may be issued by the supreme court or any district court to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and the enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

### **ARGUMENT**

**The District Court Erred in its Statutory Application by Failing to Consider the Permissive Portion of Idaho Code § 40-2319(1)**

When a writ of mandamus regards discretionary acts, the writ is appropriate when

“it clearly appears that [the actor] acted **arbitrarily and unjustly and in abuse of the discretion vested . . .**” Brady, 130 Idaho at 571 (1997) (emphasis added). The party seeking the writ must have a clear right to have the act performed, and the officer against whom the writ is sought must have a clear duty to act. Kolp v. Bd. of Trustees of Butte County Joint School District No. 111, 102 Idaho 320, 323 (1981).

Below, Total Success based its Application on Idaho Code § 40-2319(1), which reads as follows:

If any highway or public right-of-way under the jurisdiction of a county or highway district is encroached upon by gates, fences, buildings, or otherwise, the appropriate county or highway district may require the encroachment to be removed. If the encroachment is of a nature as to effectually obstruct and prevent the use of the highway or public right-of-way for vehicles, the county or highway district shall immediately cause the encroachment to be removed.

This statute describes some highway district actions as discretionary and some as mandatory. When a public right-of-way under the highway district’s jurisdiction is encroached upon, the highway district “may” require that the encroachment be removed. This decision is discretionary. When the encroachment “effectually obstruct[s] and prevent[s] the use of the . . . right-of-way for vehicles,” then the highway district “shall” immediately cause the encroachment to be removed. This decision is mandatory.

In the district court’s memorandum denying the Application, it applied the facts to the law only with regard to the mandatory portion of the statute. In the court’s limited discussion of the permissive portion of the statute, it simply rejected the possibility that the Writ should have been granted, based on the fact that the statute vested ACHD with some discretion over the matter. **The court did not discuss whether ACHD acted**

**arbitrarily and unjustly and in abuse of its discretion.** Therefore, the court erred in its application of the law.

Moreover, if the court had considered whether the permissive language warranted the granting of the Application, it would have concluded that the Writ was appropriate. In the court's discussion of the policies for granting ACHD discretion regarding the permissive portion of the statute, it cited the following:

public policy considerations such as the cost of removing all encroachments within a district could be a burdensome and impracticable task. As such, highway districts are allowed the necessary discretion to allocate the best use of their resources in removing encroachments that do not rise to the level of obstruction so as to prevent the public's use of property or roadways.

R. 52. In other words, ACHD has discretion because it needs to be able to allocate its resources most effectively when encroachments do not prevent the public's use of a roadway. However, this public policy is wholly inapplicable in this case. In the district court's own memorandum, it stated that WaMu and Idaho Power both offered to move their encroachments *for free*. R. 48. The reason ACHD has discretion over the matter is *to save money*, yet the grand total cost of removing the encroachments would have been zero dollars. Given the substantial impediment caused by the encroachments – over 25% of the alley – as a matter of law, ACHD abused its discretion, acted arbitrarily, and acted unjustly in refusing to request that the encroachments be removed. As a result, Total Success appropriately applied for a Writ of Mandate to require the removal of the encroachments.

Because the permissive portion was sufficient to warrant the granting of the Application, and in the interest of judicial expediency, this Court should vacate the district court's order dismissing the Application for Writ of Mandate, and grant the



Application for the Writ of Mandate itself. Recall that the Writ “may be issued by the supreme court.” I.C. § 7-302.

Regardless, though, the district court did not fully apply the law, basing its ruling on the incorrect assumption that a writ of mandate is always denied when the relevant officer has discretion over the decision at issue. That conclusion is not true, as the writ may be granted when, as is the case here, the relevant entity acted arbitrarily, unjustly, and in an abuse of its discretion.

**The District Court Erred by Failing to Find that ACHD was Required to Act under the Mandatory Portion of Idaho Code § 40-2319(1)**

Again, the mandatory portion of Idaho Code 40-2319(1) states: “If the encroachment is of a nature as to effectually obstruct and prevent the use of the highway or public right-of-way for vehicles, the county or highway district shall immediately cause the encroachment to be removed.” The district court’s memorandum conceded that the encroachments cause inconvenience, especially regarding parking issues, to those who attempt to use the alley. R. 52-53. It did not mention, however, the fact that the encroachments substantially prevent travel in one direction of the alley. REPORTER’S TRANSCRIPT ON APPEAL, p. 68 ll. 9-22. Because travel is prevented, the mandatory portion of the statute is triggered and ACHD should be compelled to act.

However, the district court failed to consider this evidence. It did consider evidence that parking became more inconvenient as a result of the encroachments (R. 52-53). From that evidence, it concluded that no obstruction and prevention of use occurred. It does not follow, however, that no use is prevented, simply because some uses are not prevented. Some uses may be prevented by encroachments, even if others are not.

Therefore, because the court did not consider evidence that some uses were prevented, it erred in its application of Idaho Code § 40-2319(1).

### **The District Court Erred in its Award of Attorney Fees**

The district court's decision to award WaMu attorney fees was based on a false and inadequate premise. It stated that

[r]egardless of whether there was a mandatory duty, a discretionary duty, or no duty involved in the case, it is apparent that if Washington Mutual owed a duty, it was not a duty "resulting from an office, trust or station." Consequently there never was a statutory basis for asking the court to issue a writ of mandate commanding Washington Mutual to do something. The court, therefore, finds that the claim against Washington Mutual was brought and pursued unreasonably and without foundation.

R. 69. The basis for the court's decision, then, was that no statutory basis existed for requesting a writ of mandate requiring that WaMu remove the landscaping. A review of the actual Application for the Writ, however, requires a different conclusion. Total Success requested the following in its prayer for relief: "that this court . . . [i]ssue the Writ of Mandate requiring that ACHD, Washington Mutual Bank and Idaho Power Company to immediately remove or cause the removal of the encroachments in the alley." R. 8. There is no dispute that ACHD possessed the power to require WaMu to remove the landscaping. Therefore, a request that ACHD "cause the removal" of the encroachments is simply a request that ACHD exercise its authority over WaMu.

It is perfectly logical to conclude that a basis existed to request that WaMu be required to act. There was a basis to require ACHD to act, and ACHD had the power to require WaMu to act. Therefore, a mandate could require WaMu to act, because the mandate could require ACHD to require WaMu to act. Again, there is no dispute that

authority existed to require ACHD to act. Since ACHD could be required to act, WaMu could be required to act by a writ of mandate requiring ACHD to require WaMu to act.

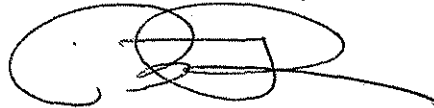
The district court's rationale, therefore, was flawed, and attorney fees were not appropriately awarded.

### CONCLUSION

For the foregoing reasons, Total Success respectfully requests:

1. This Court vacate the district court's dismissal of Total Success' Application for Writ of Mandate;
2. This Court grant the Writ of Mandate itself; and
3. This Court vacate the award of attorney fees to WaMu.

Respectfully Submitted this 8<sup>th</sup> day of June, 2009



Richard T. Roats  
Attorney for Appellant